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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DEBORAH BELL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Should this Court exercise its supervisory authority to declare that secret communications between a prosecutor and the trial judge made without notice to, and derogatory of, the defendant on trial are repugnant to the due process clause of the Fifth Amendment.

2. Did the district court violate the petitioner's right to an impartial jury and her right to a jury representing a fair cross-section of the community by swearing in an all white jury, over her objection, after the prosecutors exercised four of their seven peremptory challenges to strike all black veniremen from the panel? (See *Batson v. Kentucky*, Supreme Court docket no. 84-6263)

[1] Petitioner was tried with co-defendants Robert Tucker and Michael Ball. All defendants appealed their convictions to the United States Court of Appeals for the Seventh Circuit. Tucker's appeal is yet pending on an undecided petition for rehearing.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Deborah Bell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on September 6, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 773 F.2d 136 (7th Cir. 1985). The slip opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 6, 1985; the Petition for Rehearing and Suggestions for Rehearing and Suggestions for Rehearing *En Banc* was denied on October 10, 1985;[2] and this petition has been filed within sixty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND OTHER AUTHORITIES INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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[2] A Petition for Rehearing was also filed by co-defendant, Robert Tucker; the government was directed by the Court of Appeals to file an answer to that Petition.

Rule 7-110(b) Illinois Code of Professional Responsibility:

(b) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer, or

(4) as otherwise authorized by law.

A.B.A. Model Rules of Professional Conduct, Rule 3.5:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person except as permitted by law.

A.B.A. Code of Judicial Conduct, Canon 3A:

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither, initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

STATEMENT OF THE CASE

A.
Procedural Background

The petitioner was charged in a nine-count wire fraud (18 U.S.C. §1343) and one-count false statement to a federally insured bank (18 U.S.C. §1014) indictment. The gist of the indictment is that the petitioner, an international commodity broker, knowingly presented forged documents to Continental Bank in Chicago in order to draw down a letter of credit issued in payment for 6,000 tons of black beans. Petitioner was tried with co-defendants Robert Tucker, her Chicago attorney, and Michael Ball, a Miami freight forwarder. A six week jury trial resulted in verdicts of guilty against all defendants. A judgment of conviction was duly entered. Petitioner's appeal was denied on September 6, 1985 and her Petition for Rehearing was denied on October 10, 1985.

B.
Facts Material To The Questions Presented For Review

Deborah Bell contracted with a Guatelmalan government agency (Instituto Nacional De Commercializacion Agricola) to deliver 6,660 metric tons of black beans. Payment for these beans was to be made through an international letter of credit issued by the Guatemalan Central Bank (Banco de Guatemala) and confirmed through the Continental Bank in Chicago. Bell contended that she acquired title to the beans from a Miami corporation which called itself "International Association of Grocers" ("I.A.G."). I.A.G., in fact, consisted of several semi-retired men in Florida, who had never successfully bought, sold or brokered a commodity

deal either locally or internationally (Tr. 703-04). A principal of I.A.G. (and the only agent of I.A.G. with whom Bell dealt) was Irving Pheterson.

Bell, a white woman, hired Robert Tucker, a prominent black attorney, to represent her in this transaction. Pheterson hired Michael Ball to assist him in preparing the required shipping documentation. Bell ultimately presented a variety of documents to Continental Bank for the purpose of drawing down the letter of credit issued by Banco. It is undisputed that the documents tendered to Continental Bank were fraudulent. The principal issue at trial was whether Bell caused the documents to be forged in Chicago (or knowingly presented forged documents to Continental Bank), or whether Pheterson caused them to be forged in Miami, brought them to Chicago and held them out to be genuine to Bell. Pheterson became the principal witness for the government at trial.

Shortly after the letter of credit was drawn down, Bell and Tucker discovered that the documents were fraudulent, and that they had not acquired title to any beans from Pheterson. They travelled to the Orient together in order to rectify the situation. Further misadventure ensued however, which need not be detailed for the purpose of this petition, and the beans were never delivered to Guatemala.

i.

***Ex Parte* Communications Between Prosecutors And The Trial Judge**

Three weeks prior to the start of trial, one of the government attorneys delivered a packet of documents to the trial judge setting forth the "government's theory of the case," together with grand jury exhibits and selected por-

tions of the grand jury testimony of ten government witnesses. (See, two volumes of sealed *in camera* materials filed with the appellate court on April 28, 1983; Appendix D, paragraph one). This submission was *ex parte*—that is to say, not only did the defendants not receive a copy of the materials, they were not advised by either the prosecutor or the judge that the submission had taken place.

In the early stages of the trial the same government attorney made another *ex parte* submission to the trial judge. (See sealed *in camera* materials; Appendix D, paragraph three). This submission contained information by a government informant that defendants Bell and Tucker were engaged in international gun-running and cocaine importation. (February 24, 1983 Tr. pp. 13, 16-17). These charges of criminal conduct were not related, in any way, to the case on trial. It was conceded by the government, at the end of the trial, that such charges were entirely unfounded.

Midway through the trial the government attorney again submitted *ex parte* documents to the trial court. This time the documents alleged that one of the defendants had established a leak in the grand jury and, according to unidentified sources, was attempting to illegally influence a government witness to change his statement. (See sealed *in camera* materials; Appendix D, paragraph four; February 24, 1984 Tr. p. 16). This report was also false, but its falsity was never acknowledged by the government.

In each of these three instances the prosecutors failed to provide copies of the offending materials to the defendants, and failed to advise the defendants that either they intended to or had submitted such materials to the judge. Furthermore, the trial judge failed to advise the defen-

dants that he had received such *ex parte* communications until the day of sentencing (several weeks after the conclusion of the trial). These secret communications would have remained unknown to the defendants even after trial were it not for a coincidental post-trial development.

On the day set for sentencing, Bell's attorney brought certain recently discovered facts to the trial judge's attention. Defendant Bell had been contacted by a minor actor in the black bean transaction who did not testify at the trial, one James Gunnells, who told her that he had proof that she had been wrongfully convicted. He claimed to have seen copies of the forged shipping documents in Florida before they were brought to Chicago by the government's witness, Pheterson. If true, this would establish that the government's theory of the case—that the documents were forged in Chicago by the defendants—was groundless.

Bell asked for a postponement of sentencing in order to determine whether or not a basis for a new trial existed. Her motion was denied. However, the trial judge stated that the name of Gunnells "rang a bell." He then related to the defense attorneys what had happened without their knowledge and behind their backs.

> The Court: Well, let me tell you what happened before all of this transpired. I think this was prior to trial; but if not, at the beginning of trial.
>
> The government submitted to me some *in camera* material.
>
> * * *
>
> This *in camera* submission was given to me and requested to be maintained *in camera* and not disclosed for a couple of reasons. First of all, it was not 3500 material and the government said that it was not *Brady* material; rather it was inculpatory. After I read it, I agreed with that. (Tr. Feb. 24, 1983, pp. 11-12)

Upon discovering the fact that derogatory material had been submitted to the court *ex parte*, defendant Bell objected to the practice, demanded a mistrial and moved the court to recuse itself. The court peremptorily denied the motions.

> Mr. Lydon: We sit here and all of this stuff gets slipped in under the door. I object most strenuously to these *in camera* submissions. We have no right to confront them. I would like the opportunity to cross-examine Mr. Gunnells. (Tr. Feb. 24, 1984, p. 21)
>
> Mr. Lydon: I want to make a motion—a *nunc pro tunc* motion—in the sense that I had no idea your honor had been prejudiced with these materials, nor did I know exactly when it was, but it was sometime during the trial.
>
> * * *
>
> [I] have a motion that your honor recuse himself because of the bias that is in part as a result of that information being submitted *in camera*. It was not any part of this case; rather nasty accusations, to say the least, about what my client and other people may have been involved in . . . I had every right but no opportunity to confront it, and it just gets slipped under the door. I object to that practice.
>
> I ask for a mistrial and I ask your honor to recuse himself.
>
> The Court: Both motions will be denied. (Tr. Feb. 24, 1983, p. 25)

ii.

Racial Discrimination In Jury Selection

During the jury selection, the prosecutors struck every black person who was tendered as a potential juror from the venire. When the defendants objected to the practice, the judge had a side bar with the prosecutors who pro-

fessed a lack of a racial motivation by stating that "the four blacks happened to have very little education or commercial experience," (Tr. 79-80). Several of the four blacks had a high school education and one of the three, David Bennett, had operated a metal recycling enterprise for 25 years (Tr. 54-55). Because the side bar excluded the defendants, they were unable to point out that two white jurors, one of whom subsequently became the foreperson, did not have a high school education and lacked commercial experience altogether (Tr. 17, 21-22, 34-35, 54).

REASONS FOR GRANTING THE WRIT

A.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO DECLARE THAT SECRET COMMUNICATIONS BETWEEN A PROSECUTOR AND THE TRIAL JUDGE, MADE WITHOUT NOTICE TO, AND DEROGATORY OF, THE DEFENDANT ARE REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Virtually every basis for this Court to exercise its discretionary jurisdiction is present in this case. The actions of the government prosecutors violated the canons of ethics, the federal criminal laws, the due process clause of the Fifth Amendment and the spirit of this Court's holding in *Gregg v. United States*, 394 U.S. 489 (1969). The decision of the Court of Appeals sanctions this misconduct; indeed, it encourages future misconduct by its failure to condemn the practices as violations of due process of law. This Court should exercise its supervisory authority over the district court to ensure that the offend-

ing conduct is not further tolerated by federal courts. The practices are unqualifiedly impermissible and strike at the heart of a fair trial.[3]

In *Rosenberg v. United States*, 346 U.S. 273 (1951) this Court acknowledged its responsibility to supervise the administration of criminal justice by the federal judiciary. One component of that responsibility is to see that the criminal laws are enforced by fair proceedings. This Court has further assumed the responsibility to formulate rules of procedure where it appears necessary to maintain proper standards in federal criminal procedure, *Holland v. United States*, 348 U.S. 121 (1953).

> Fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1955).

The petitioner's charges of injustice and unethical conduct which are presently a matter of public debate as a result of these proceedings are clearly not "irrational or perverse." Rather, the record in this case clearly substantiates each such claim.

Due process requires a trial which is fair both in fact and in appearance. It also requires procedures which are adequate and appropriate to protect people charged with

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[3] The conduct of the government attorneys in the case at bar was so egregious as to motivate the Chicago Bar Association to request leave to file an *amicus curiae* brief in the United States Court of Appeals for the Seventh Circuit in connection with the Petition for Rehearing filed by this petitioner's co-defendant, Robert Tucker. (United States Court of Appeals for the Seventh Circuit, docket number 83-1438.)

a crime from abuses by those holding positions of power and authority, *Chambers v. State of Florida*, 302 U.S. 226 (1940). *Ex parte* communications between the prosecutor and trial judge are philosophically obnoxious to due process of law. They create potential prejudice on the part of the judge toward the defendant, and they undermine public confidence in judicial decisions.

This Court has declared that there are some constitutional rights that are so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California*, 368 U.S. 18 (1967). One such right is the right to an impartial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927). In this case the government prosecutors deprived the petitioner of that right when they made secret submissions of prejudicial information concerning this petitioner to the judge during the course of the trial. The essence of American criminal justice is a public trial at which all evidence against an accused is openly presented and subjected to the rights of cross-examination. The government attorneys in the case at bar subverted that process.

This Court would never approve of government prosecutors meeting *ex parte* in chambers with the district judge *prior to the start of trial* for the purpose of telling the judge that government informants report that the defendants about to appear for trial are believed also to be engaged in drug smuggling, gun-running and jury tampering—crimes which are unrelated to the charge before the court. This "back-dooring" or "conditioning" (more accurately, "prejudicing") of the trial judge by the prosecutors is totally repugnant to any notion of due

process of law, is unquestionably unethical,[4] is itself a criminal act[5] and it unqualifiedly impugns the integrity of the subsequent trial.

What the prosecutors did in the case at bar was virtually identical to the above-described scenario. Prior to trial, they secretly provided documents to the trial judge which leveled the same unfounded charges against the defendants.[6] The prosecutors' actions were such a departure from clearly understood and mandated procedures as to leave no room for the excuse of inadvertance or mistake.

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[4] Ill. Code of Professional Responsibility Rule 7-110: A lawyer shall not communicate or cause another to as to the merits of the cause with a judge . . . except (1) in the course of official proceedings in the cause; (2) in writing if he promptly delivers a copy in writing to opposing counsel . . . ; (3) orally upon adequate notice to opposing counsel; or (4) as otherwise authorized by law.

To the same effect, see the A.B.A. Model Rules of Professional Conduct Rule 3.5.

The A.B.A. Code of Judicial Conduct, likewise forbid a judge from hearing such *ex parte* communications. See Canon 3A(4).

[5] See Obstruction of Justice, 18 U.S.C. §1503.

[6] When confronted with their illegal, unethical and unconstitutional acts, the prosecutors attempted to justify their misconduct by asserting that they had been "unsure" whether the documents were 18 U.S.C. §3500 material or *Brady* material [*Brady v. Maryland*, 373 U.S. 83 (1963)] and that they gave the statements to the judge for his determination on those points. This purported justification is frivolous and obviously fabricated.

As to the *Brady* issue, if these prosecutors honestly did not know if irrelevant charges of drug smuggling and gun-running were exculpatory or inculpatory, then they ought to be barred from practice in the federal courts for lacking minimum legal competence. As to their §3500 explanation, the prosecutors have been betrayed by their own words. Their cover letter to the trial judge which accompanied the offending material, stated,

> The source will not be a government witness. Therefore, the material is not 3500 material. (cited at Gov. Brief on Appeal p. 82)

In *Gregg v. United States*, this Court was met with a defendant who had been convicted of an offense that carried a mandatory sentence of 25 years. Upon the return of the jury's verdict the trial judge revealed that at the close of all of the evidence he had read a presentence report which detailed other alleged crimes by the defendant. Because the report contained information of which the court was already aware from an earlier psychiatric report, the conviction was affirmed. On review this Court recognized, however, that if the report had been examined *before* the verdict and had brought derogatory information to the attention of the trial judge, a reversal would be required.

> "[The presentence report] *must not, under any circumstances*, be 'submitted to the court' before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes *error of the clearest kind.*
>
> Moreover, the rule must not be taken lightly. Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and *they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the ex parte introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report.* No trial judge therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid." (Emphasis added.) *Gregg v. United States*, 394 U.S. 489, 492 (1969).

The *ex parte* communication of derogatory information to the trial judge is inappropriate for two reasons: (a) it can affect the court's judgment and decisions and (b) it creates the appearance of unfairness. The earlier in the proceeding that such material is received, the greater is its potential for prejudice and impact upon judicial rulings.

It is absolutely essential that proceedings which may result in the imprisonment of a citizen not only be fair, but appear fair. Consider this case from the point of view of a mature, experienced businesswoman and an attorney of 25 years experience, who are accused of a business fraud, and have never before been accused of crime. They discover, after the evidence is closed, that the trial judge willingly received a secret briefing regarding the government's accusations prior to the beginning of the trial, and also read materials which accused them of drug importation, the illegal international sale of firearms, and jury tampering. They did not know of these allegations of criminal activities, much less have an opportunity to rebut them, until the morning of their sentencing. Nevertheless, the trial judge had been exposed to these vicious and false reports for the entire duration of their six-week trial. It is certainly rational for the defendants to reflect on the court's trial rulings and conclude that they now understand why each of those close evidentiary calls went against them. They now "know" why favorable admissible evidence was excluded[7] and irrelevant, damning evi-

[7] The United States Court of Appeals for the Seventh Circuit ruled that the District Court's exclusion of a document which seriously impeached the credibility of the government's chief witness was erroneous. (773 F.2d at p. 141.)

dence was allowed into the record.[8] They quite reasonably conclude that the prosecutors successfully poisoned the mind of the trial judge against them. They, and most casual observers, "know" that the case was not tried before an unbiased judge as the Constitution requires.

This Court has unequivocally held that any tribunal which is permitted by law to try cases must not only be unbiased, but must avoid even the appearance of bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) *rehearing denied* 393 U.S. 1112. Public confidence in judicial decisions depends upon the appearance of fairness. The government's acts of supplying unfounded *ex parte* evidence to the judge destroyed this trial's integrity in fact, as well as its appearance of integrity.

Whether the focus in the instant case is upon ethical standards, this Court's inherent supervisory powers, or the constitutional protections that were infringed by the prosecutor's submissions to the trial court, it is clear that what occurred in this case requires this Court's review and a reversal of this conviction.

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[8] The trial judge allowed the government to introduce evidence identifying certain luxury goods that Bell purchased with her commission. In that she never disputed receiving the money, the sole purpose of such evidence was to prejudice her before the jury on irrelevant facts.

B.

THE DISTRICT COURT VIOLATED THE PETITIONER'S RIGHT TO AN IMPARTIAL JURY AND HER RIGHT TO A JURY REPRESENTING A FAIR CROSS-SECTION OF THE COMMUNITY BY SWEARING IN AN ALL WHITE JURY, OVER HER OBJECTION, AFTER THE PROSECUTORS EXERCISED FOUR OF THEIR SEVEN PEREMPTORY CHALLENGES TO STRIKE ALL BLACK VENIREMEN FROM THE PANEL.

There is now pending before this Court, the case of *Batson v. Kentucky*, (No. 84-6263). This Court's granting of a writ of certiorari in *Batson* establishes the vitality of this issue.

The petitioner asserts that in the case at bar, she has born her burden of establishing that the excuses offered by the government attorneys for their wholesale exclusion of all blacks from the jury were pretextual and that such exclusion was patently discriminatory. She takes the unimpeachable position that a defendant has the right to a jury whose racial makeup has not been systematically manipulated by the government. The Fifth Amendment prohibits such gamesmanship by the prosecutors.

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Washington v. Davis*, 426 U.S. 229.

This petitioner is white and the excluded jurors were black. Nevertheless, she has been injured every bit as seriously as was her black co-defendant, Robert Tucker.[9]

[9] Tucker's petition for rehearing has not been ruled upon to date. The Court of Appeals has ordered the government to respond to

(Footnote continued on following page)

As a result of I.A.G.'s failure to deliver the black beans pursuant to the purchase and sale agreement, Bell was forced to travel to the Orient for the purpose of attempting to secure the beans for delivery to Guatemala. Tucker travelled with her. Juror acceptance of the propriety of foreign travel of a white woman with a black man were of obvious importance to Bell. Common sense suggests that black jurors would be less likely to be offended by the race of her travel companion than would white jurors and white jurors who might be so offended would not likely admit to such prejudices during *voir dire*. The presence of black jurors would tend to blunt any such prejudices during the jury's deliberations.

The government's careful exclusion of all black jurors worked an injustice upon both Bell and Tucker but for different reasons.

CONCLUSION

The United States Court of Appeals for the Seventh Circuit has decided an issue in conflict with decisons of this Court. The prosecutors' actions in this case were ethically and constitutionally reprehensible. They undermined the integrity of the entire proceeding. Their *ex parte* communications with the trial judge infected the case from the outset. Their purposeful exclusion of all blacks from the jury was facially discriminatory. Substan-

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[9] *continued*
Tucker's discrimination in jury selection issue. It denied petitioner's petition for rehearing although she pressed the same argument herself.

tial due process questions [illegible]esented. For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit and such judgment should be reversed.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-1438, 83-1439, 83-1444

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT L. TUCKER, DEBORAH BELL, and MICHAEL BALL,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 253—**Charles P. Kocoras**, *Judge*.

ARGUED MAY 25, 1984—DECIDED SEPTEMBER 6, 1985

Before POSNER and COFFEY, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.*

POSNER, *Circuit Judge*. Michael Ball, Deborah Bell, and Robert Tucker were tried together for wire fraud (see 18 U.S.C. § 1343) and for submitting false statements to a federally insured bank (18 U.S.C. § 1014); were convicted by a jury; and were sentenced to prison terms of 9 months (Ball), 15 months (Tucker), and 2 years (Bell), plus periods of probation and, in the case of Bell and Tucker, were also ordered to make restitution of $5 million, subject to certain conditions. All three defendants appeal, raising a variety of questions.

The scheme charged by the government worked as follows. Bell, a commodities broker in Chicago, with the aid of Ball, a freight forwarder in Miami, and Tucker, who

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* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

was Bell's lawyer, made a contract to sell 6,000 tons of beans to Guatemala for $5 million. Bell did not have the beans, of course; she was a middleman; to get the beans she turned to Irving Pheterson, a commodities broker in Miami who had a supplier in the Far East. The contract with Guatemala was to be paid for by a letter of credit issued by a Guatemalan bank and confirmed by the Continental Illinois National Bank in Chicago. Under the terms of the letter of credit, the Continental Bank would pay Bell for the beans upon receipt of documents showing that they had been loaded on board ship in Hong Kong en route to Guatemala, and Bell would then reimburse Pheterson. So the beans would go from Hong Kong to Guatemala, while payment would go from the Continental Bank to Bell to Pheterson. The letter of credit made the Continental Bank in effect the payment agent of the Guatemalan buyer.

Documents showing that the beans had been loaded were presented to the bank, and the bank paid the letter of credit. But the documents had been forged; the beans had not been (and never were) shipped. Pheterson testified under a grant of immunity that the three defendants had forged the documents. There is no question the documents were forged; the question is by whom. The defendants argue that Pheterson was the real architect of the fraud and testified against them to save his own skin. The government's theory was different: that since the letter of credit had not been made transferable, the defendants could not assign it to someone as collateral for a loan that would enable them to buy the beans needed to fulfill the contract, see generally White & Summers, Handbook of the Law Under the Uniform Commercial Code 747-51 (2d ed. 1980), and had turned to forgery to get the money they needed to buy the beans.

The substantive issue in this appeal, an issue apparently of first impression, is whether a letter of credit is within the scope of 18 U.S.C. § 1014, which punishes false statements made to influence a bank's action "upon any

application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." The false statements in this case were made to induce the Continental Bank to deposit $5 million in the defendants' account. The transaction fits comfortably within the statutory terms "application," "advance," and "commitment." The bank was obligated to pay Bell upon presentation of the required documents. This was a commitment; and the forged documents were in support of an "application" designed to induce the bank to honor its "commitment" and "advance" funds to the applicants.

Williams v. United States, 458 U.S. 279 (1982), on which the defendants rely, is inapposite. The Court held that check-kiting does not violate section 1014, because merely depositing a check that is not backed by funds is not a false statement. See *id.* at 284-85. The defendants in this case made explicit representations which were false in order to get Continental Bank to part with $5 million. Although we can find no cases under section 1014 involving letters of credit, our conclusion that a fraudulent representation made to induce the bank to pay the beneficiary violates the section is supported by analogy to several cases decided after *Williams*: *United States v. Price*, 763 F.2d 640, 643 (4th Cir. 1985); *United States v. Davis*, 730 F.2d 669, 673 (11th Cir. 1984); *United States v. Shaid*, 730 F.2d 225, 232 (5th Cir. 1984); *Prushinowski v. United States*, 562 F. Supp. 151, 156-58 (S.D.N.Y. 1983).

We next consider the sufficiency of the evidence to convict. Pheterson was, as the judge remarked, an unreliable witness, not only because he had an incentive to shift the responsibility for the fraud to the defendants but because his testimony contained contradictions and memory lapses, and, more seriously, because there is evidence that he is mentally impaired (more on this shortly). Nevertheless there is no serious question about the guilt of Bell and Ball, at least. Fingerprint and handwriting evidence, statements to third parties, testimony from bean suppliers, and the testimony of Tucker's secretary corroborate Pheterson's testimony against them.

Although there is more question about Tucker's guilt, we are persuaded that a reasonable jury could find sufficient corroboration of Pheterson's testimony to convict Tucker, even if the jury maintained as it should have done a healthy skepticism about Pheterson's honesty and recollection. Among the documents submitted to the bank on September 5, 1980, to get the letter of credit paid was one that certified that the beans were on board ship in Hong Kong. But shortly afterward Tucker got approval for a letter of credit to pay for beans to fulfill the contract. This shows that Tucker knew the document was false, albeit after the document had been submitted to the bank. Some of his secretary's testimony indicated that Tucker was present when questionable documents were being prepared (for example, a phony bill of lading for the beans purportedly shipped from Hong Kong), and she testified to statements made by him that were consistent with guilty knowledge. And Tucker wrote checks to himself for a total of $68,000 from an account in which the letter of credit had been deposited. These payments ostensibly were to repay a loan he had made to facilitate the transaction, but even so this suggests that his role was entrepreneurial, and not just that of a lawyer (his theory). Although apart from Pheterson's testimony the evidence fell far short of proving Tucker's participation in the fraud beyond a reasonable doubt—most of it being consistent with his playing just a lawyer's role—the significance of the other evidence is that it corroborates Pheterson's testimony. Ordinarily a jury can convict on the basis of a single eyewitness's testimony, but we may assume that where the witness was as unreliable as Pheterson there would have to be some corroboration. There was.

We turn now to the alleged procedural errors at the trial. The district judge refused to order a psychiatric examination of Pheterson or conduct a hearing on his competence to testify, and the defendants argue that this was error because Pheterson (they argue) obviously had serious mental problems. For reasons discussed in *United*

States v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984), and unnecessary to repeat here, we hesitate to reverse a district judge's refusal to order that a witness submit to a psychiatric examination; and there was no abuse of discretion by the judge in this case. The defendants make much—too much—of the fact that in 1978, two years before the event in issue, Pheterson had brought a personal-injury suit, later dismissed, in which he claimed to have suffered brain damage as a result of being exposed to dry-ice fumes (i.e., carbon dioxide); of his subsequent statements that the carbon-dioxide poisoning had caused an impairment of his memory; and of a letter that Pheterson wrote to an assistant United States attorney in which he discussed the conflict between his "oversoul" and his "undersoul." In fact there is no indication that Pheterson had suffered significant brain damage caused by dry-ice fumes or anything else (he was conducting business as usual two years after bringing that suit), or that he had any mental illness, though he admitted that he had a problem remembering things—a type of problem too common, however, to be suggestive of a mental disease or defect that psychiatry might elucidate. The letter in question is rambling, weird, but not demented. The reference to a conflict between the "oversoul" and the "undersoul"—between what Freudian psychologists call the superego and the id, and what laymen a generation ago called one's "good angel" and one's "bad angel"—is not evidence of mental illness. The letter was a rough draft that Pheterson was reluctant to turn over to the assistant United States attorney; and many rough drafts, like the unedited thoughts that run through people's minds, are pretty strange. Although the defendants' psychiatric expert said that Pheterson's brain injuries and statements were consistent with "Organic Amnestic Syndrome," "one of the major symptoms of [which] is confabulation, the recitation of imaginary events to fill in gaps in memory," many minor symptoms are "consistent" with major diseases; a cough is consistent with lung cancer. All the record of this case shows is a troubled and

evasive witness desperate for immunity and selective and self-justifying in his recollections. It does not show a man who is demented, and the judge was not required to force him to submit to an examination by a psychiatrist. Cf. *United States v. Eschweiler*, 745 F.2d 435, 438 (7th Cir. 1984). The witness in *Gutman*, in contrast, had a long history of serious mental illness.

The letter we have just mentioned is a main prop of the defendants' claim that the government pressured Pheterson to tell the government's version of the events constituting the fraud, regardless of what he actually believed, by dangling immunity bait; for the letter ends: "Every time I start to writing I feel that I am not 'saying it right' so I tear it up and start over. I hope this is what you need. Please advise. Thank you." But Pheterson had given the outline of his story in connection with a civil suit before being subpoenaed by the grand jury; the letter from which we have quoted is consistent with Pheterson's simply having found it difficult to set forth the entire complicated story in a coherent form; and the assistant United States attorney to whom the letter was addressed repeatedly adjured Pheterson to tell the truth.

Tucker also objects to the judge's refusing to let him introduce the letter into evidence as an exhibit. The letter was incorrectly excluded as hearsay. It would have been hearsay if offered to show the truth of what it contained, but it was not hearsay when offered to undermine the writer's credibility as a witness. Though we ourselves are not troubled by the discussion in the letter of the war between Pheterson's "oversoul" and "undersoul," the jury was entitled to consider the letter as evidence that, as the defendants argued, Pheterson was an unreliable witness. But the error in excluding the letter from the documentary evidence in the case was harmless. The defendants used the letter to cross-examine Pheterson, so that much of it was read to the jury. It was used, of course, to undermine Pheterson's credibility, which is the only pur-

pose for which Tucker wanted the letter used. We cannot imagine that the jury would have reached a different result by having the letter to reread in the jury room with the extensive other documents in the case.

Tucker objects to the district court's refusal to admit the results of a lie-detector test which he had taken and passed. In this circuit the admissibility of lie-detector test results has thus far been left to the discretion of the trial judge. *United States v. Williams*, 737 F.2d 594, 611 (7th Cir. 1984). Perhaps some day we will have to lay down circuit-wide policy on the question but this is not the case in which to do so. Tucker refused to agree before he took the lie-detector test that the results, whatever they were, could be used in evidence. Such a refusal could well make lie-detector test results unreliable. See *United States v. Feldman*, 711 F.2d 758, 767 (7th Cir. 1983); but see Raskin, Barland & Podlesny, *Validity and Reliability of Detection of Deception* 6, 21-22, 24-25 (Natl. Inst. of Law Enforcement and Crim. Justice, June 1978). The lie detector does not peer into the mind; it is a test of (relative) anxiety, and if the person taking the test has nothing to lose and everything to gain, he may not be anxious and his passing the test may prove nothing. Whatever the force of this doubt, it is readily alleviated by agreeing to allow the government to put the test results, whatever they may be, into evidence if it wants; and a defendant who refuses to make such an agreement is in a poor position to challenge the district court's exercise of its discretion to refuse to admit the results.

Tucker also complains about the district judge's refusal to let him address the jury in closing argument. Tucker is a lawyer and could if he had wanted have represented himself (of course he could have done so even if he were not a lawyer), but in fact he had three lawyers at trial and his own participation as counsel was minimal. The judge was concerned that since the jury had seen Tucker as a defendant, not as a defense lawyer, it would

be confused if he addressed it in closing argument; the jury would think it was being addressed by a defendant, not by a lawyer. Tucker had declined to testify, thus sparing himself cross-examination. To allow him to address the jury would in effect have allowed him to testify without being subject to cross-examination. This is the same "heads I win, tails you lose" tactic that Tucker attempted with the lie-detector test. The judge did not abuse his discretion by not allowing Tucker to address the jury.

Next the defendants complain about certain documents that the government submitted to the district judge *in camera*. The documents consisted of reports from a confidential government informant on other misdeeds of the defendants, and the purpose of the submission—the ostensible purpose anyway—was to make sure the government was not required to give any of this information to the defendants. The judge ruled that it was not exculpatory, and the defendants argue that the real purpose was to poison the judge's mind against them. But we think the government acted prudently, since if it had not submitted the documents for the judge's inspection it might have opened itself up to a later attack for violating the defendants' rights under the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), and *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). As for poisoning the judge's mind, that is a ridiculous suggestion. Anytime a judge grants a motion to suppress evidence against the defendant, it means the judge is in possession of damaging evidence that the jury will not see; and yet we do not on that account require that the trial be conducted before another judge, who is innocent of this evidence. We trust our judges to preside impartially over trials in which they know much that the jury does not know adverse to the defendants; there is no indication that the district judge failed to do his duty in this case.

The defendants also argue that the prosecutor improperly used four of his seven peremptory challenges to

exclude all four black veniremen from the jury, with the result that the jury was all white. Whether the exercise of peremptory challenges on racial grounds violates a criminal defendant's rights when there is no suggestion that the prosecutor's office follows a policy of racial exclusion (that is, uses racially motivated peremptory challenges systematically, and not just occasionally) is an issue now before the Supreme Court. See *Batson v. Kentucky*, 53 U.S.L.W. 3757 (cert. granted April 23, 1985). However it is resolved, these defendants are unlikely to be helped. For the judge in this case, though not required to do so, asked the prosecutor to explain the basis of the four challenges of blacks, and the judge believed the prosecutor's explanation that the motive was not racial. The prosecutor wanted an educated jury that could understand letters of credit and the other aspects of this complicated commercial transaction, and the four blacks happened to have very little education or commercial experience. The judge did what courts that consider racial peremptory challenges unlawful require the trial judge in these cases to do; he satisfied himself that racial bias had not been responsible for the exclusion of the blacks. See, e.g., *McCray v. Abrams*, 750 F.2d 1113, 1131-33 (2d Cir. 1984). His determination, although challenged by the defendants, was not clearly erroneous, and therefore binds us.

The other grounds for reversal advanced by the defendants have no possible merit.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 6, 1985.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 83-1438, 83-1439, 83-1444

vs.

ROBERT L. TUCKER, DEBORAH BELL and MICHAEL BALL,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253
Judge Charles P. Kocoras.

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* The Honorable William J. Campbell of the Northern District of Illinois, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 10, 1985.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-1439 v.

DEBORAH BELL,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 253
Charles P. Kocoras, *Judge.*

* The Honorable William J. Campbell of the Northern District of Illinois, sitting by designation.

ORDER

On September 20, 1985, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX D

(Letterhead of)
U.S. DEPARTMENT OF JUSTICE
United States Attorney
Northern District of Illinois

DCM:kfr

United States Courthouse
Chicago, Illinois 60604

May 10, 1984

HAND DELIVER

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Chicago, Illinois 60606

Re: *United States v. Robert Tucker, Deborah Bell, and Michael Ball,* No. 82 CR 253

Gentlemen and Ms. Kaiser:

Pursuant to the district court's order entered in the above-named case on May 9, 1984, the following items are enclosed:

1. Letter from Assistant United States Attorney Stowell to Judge Kocoras, dated October 15, 1982, tendering grand jury materials with government's theory of the case;
2. Notification dated December 1, 1982, of Portia McKinney's brief service on the grand jury which later returned the indictment in this case;
3. December 8, 1982, submission of FBI internal communication relating information FBI received from James Gunnells concerning possible bad acts of others; and
4. December 14, 1982, submission of FBI internal communications relating information received from James Gunnells.

The two remaining *in camera* submissions relate to:

1. December 1, 1982, submission advising that a government witness was investigated for an alleged bad act having nothing to do with this case, and that the investigation was closed with no arrests or charges; and
2. December 8, 1982, submission of FBI internal communications concerning a government witness' work record between 1970-1976, and alleged bad act in 1972, investigated with negative results, and having nothing to do with this case.

Very truly yours,

DAN K. WEBB
United States Attorney

By: /s/ MARY STOWELL
Assistant United States Attorney

Enc.

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-976

In the Supreme Court of the United States

OCTOBER TERM, 1985

DEBORAH BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOP A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-976

DEBORAH BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends primarily (at 9-15) that the government's in camera submission of documents to the district court for a determination whether they should be produced under *Brady* v. *Maryland*, 373 U.S. 83 (1963), deprived her of due process.

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on nine counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of presenting false statements to a federally insured bank, in violation of 18 U.S.C. 1014. She was sentenced to concurrent terms of two years' imprisonment on five of the wire fraud counts, to be followed by five years' probation on the remaining counts. She was also

ordered to make restitution of $5 million, subject to certain conditions. The court of appeals affirmed. Pet. App. 1-9.[1]

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner, a commodities broker, was the intermediary for a sale of 6,000 tons of black beans from a supplier in Hong Kong to a Guatemalan government agency. Pursuant to the sales contract, the buyer arranged for a $5 million letter of credit, to be paid to petitioner upon her submission of documents showing that the beans had been loaded on a vessel in Hong Kong. Petitioner submitted the required documents and obtained the funds. She and her co-defendants had forged the papers, however, and no beans were in fact shipped to Guatemala. Pet. App. 1-2.

Early in the trial, the government submitted to the district court, in camera, a report compiled by the Federal Bureau of Investigation concerning information supplied by a confidential source, James Gunnells. Although the government believed that the material was inculpatory, it made the report available to allow the district court to determine whether it should be produced pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). Pet. App. 8; 2/24/83 Tr. 40. The district court concluded that the report was not discoverable; the court stated that it "intend[ed] to ignore th[e] document in totality" and was "not going to credit [it] one wit." *Id.* at 17, 42-43.

2. Petitioner contends (Pet. 9-15) that the in camera submission of the FBI report deprived her of due process by

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[1]Petitioner's co-defendants Robert L. Tucker and Michael Ball similarly were convicted on all ten counts, and their convictions also were affirmed on appeal.

prejudicing the district judge.[2] When a prosecutor has any doubt concerning the defendant's right to material under *Brady* or the Jencks Act, 18 U.S.C. 3500, courts have consistently recommended and approved the practice of submitting the material to the district court for an in camera determination of whether it should be produced. See, *e.g.*, *United States* v. *Dupuy*, 760 F.2d 1492, 1501 (9th Cir. 1985); *United States* v. *Darby*, 744 F.2d 1508, 1525 (11th Cir. 1984), cert. denied, No. 84-1260 (May 13, 1985); *United States* v. *Holmes*, 722 F.2d 37, 41 (4th Cir. 1983) ("[I]t would be the prosecutor's obligation to submit any material to the district court in camera if he had any doubts about whether it might be exculpatory."). Faced with a long and complicated trial, the prosecutor was justifiably concerned to avoid the inadvertent commission of reversible error. Accordingly, "the government acted prudently" in providing the material to the district court for its evaluation. Pet. App. 8.[3]

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[2]Petitioner, who is white, also contends (Pet. 16-17) that the government's use of peremptory challenges to strike four black veniremen from the jury violated her right to an impartial jury. Although the question of the propriety of a prosecutor's consideration of race in exercising peremptory challenges is currently pending before the Court in *Batson* v. *Kentucky*, No. 84-6263 (argued Dec. 11, 1985), there is no need to hold this petition for the decision in that case, because there is here no factual basis for the claim. Both the district court (12/6/82 Tr. 81-82) and the court of appeals (Pet. App. 9) concluded that the peremptory challenges were exercised on the basis of the veniremen's lack of education rather than their race. See generally, *e.g.*, *United States* v. *Campbell*, 766 F.2d 26 (1st Cir. 1985). This concurrent finding of fact by the courts below obviously does not merit review by this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, No. 83-1007 (Jan. 9, 1985), slip op. 7-8 n.5. We note as well that the court of appeals denied co-defendant Tucker's petition for rehearing (see Pet. 16-17 n.9) on December 5, 1985.

[3]Petitioner now contends (Pet. 12 n.6) that the material could not possibly have been exculpatory or otherwise discoverable. In both the district court (2/24/83 Tr. 22) and the court of appeals (Appellant's Br. 7), however, petitioner argued that the report should have been

Petitioner's claim of prejudice was appropriately characterized by the court of appeals as "a ridiculous suggestion." Pet. App. 8. The district court repeatedly made it clear that it "absolutely [would] not rely on th[e] information." 2/24/83 Tr. 25; page 2, *supra*. As the court of appeals concluded, "[w]e trust our judges to preside impartially over trials in which they know much that the jury does not know adverse to the defendants; there is no indication that the district judge failed to do his duty in this case." Pet. App. 8. If petitioner believes that certain of the district court's evidentiary rulings at trial were erroneous (Pet. 14-15), she should have presented that question directly in her petition rather than making a bare allegation that the rulings were the product of bias on the part of the trial judge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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produced to her. It was to avoid just this possibility of second-guessing that the government properly submitted the material to the district court for its evaluation.

Petitioner also suggests (Pet. 10 & n.3) that the government attorneys acted unethically in submitting the material to the district court. The amicus curiae statement referred to by petitioner, which the court of appeals refused to accept, contained no allegation of unethical conduct. We have been informed by the United States Attorney's Office that there are no disciplinary proceedings pending against the prosecutors in this case.

DOJ-1986-02